Conoco, Inc. *and* Charles J. Moore, for and on behalf of Oil, Chemical and Atomic Workers International Union AFL-CIO, Local 6-659 *and* Patricia A. Fransen. Cases 18-CA-6571 and 18-CA-6665

December 10, 1982

DECISION AND ORDER

On January 5, 1981, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The Administrative Law Judge found, *inter alia*, that Respondent had violated Section 8(a)(1) and (3) of the Act by discontinuing Patricia Fransen's disability benefits at the commencement of a strike. To remedy this violation, the Administrative Law Judge utilized the remedy provided by the Board majority in *E. L. Wiegand Division, Emerson Electric Co.*[2] For the following reasons, we have modified that remedy.

The stipulated facts show that for some 29 years the Union has been the collective-bargaining representative of the production and maintenance employees involved here. The parties' most recent collective-bargaining agreement ran from January 8, 1979, through January 7, 1981. However, on January 8, 1980,[3] the Union commenced a lawful economic strike at Respondent's facility. At the time of the strike, Patricia Fransen was a unit employee of Respondent. However, commencing on January 3, she had been unable to work for medical reasons, and, at the start of the strike on January 8, she was confined to a hospital. As of January 3, Respondent began paying Fransen disability payments pursuant to Respondent's Comprehensive Disability Income Plan (CDIP). However, starting on January 8, with the advent of the strike, Respondent discontinued Fransen's disability payments although it knew on that date that she was still in a hospital and under a doctor's care. Respondent did not pay benefits to her thereafter. The stipulated facts also reveal that, on February 22, Patricia Fransen began an active participation in the strike by picketing for the Union. Her doctor had authorized her to return to work, commencing March 25. However, the strike did not end until April 1, and the employees returned to work on April 2.

The General Counsel alleged that Respondent's denial of the disability benefits to Fransen at the outset of the strike violated the Act. Respondent countered that its action was permitted under the CDIP, which indicated at subsection 4 of the "Denial of Benefits" section that benefits could be curtailed in the following situation:

> If benefits are being paid prior to a strike or layoff, such benefits will cease for the duration of such strike or layoff. No benefits will be paid during the time you are on strike or layoff.

Respondent also sent a letter to its striking employees on January 15 which reminded them with regard to the Plan that "Coverage under the [CDIP] is discontinued for employees on strike."

Based on the above facts, the Administrative Law Judge found the violation as alleged by the General Counsel. He found that under our decision in *Emerson, supra*, the General Counsel had made out a *prima facie* case of an 8(a)(1) and (3) violation in the denial of the benefits and he rejected Respondent's defense which was predicated largely on subsection 4 of the "Denial of Benefits" section of the CDIP. However, the Administrative Law Judge assumed for the purpose of his decision that the Union had, in fact, agreed to that subsection and that it was not, in fact, an illegal provision. Nonetheless, he found the provision so ambiguous that it could not clearly be said to apply to Fransen. Instead, he found from the provision's second sentence and Respondent's own January 15 letter to the employees about the cessation of benefits during the strike that the restriction on the payment of benefits under the plan applied only to those employees who were *on* strike. Because the Administrative Law Judge concluded that the hospitalized Fransen could not be "on strike," he found the subsection on which Respondent relied did not apply to her.

With respect to the remedy, however, and consistent with the Board majority decision in *Emerson, supra*, the Administrative Law Judge concluded that Fransen was entitled to disability benefits only from January 9 until February 21 because, on February 22, she had joined the strike and ap-

[1] The Administrative Law Judge found, and we agree, that Respondent's disciplinary action against four strikers violated Sec. 8(a)(1) of the Act. However, the Administrative Law Judge erroneously recited that the parties had stipulated that the discipline "was for an act or acts of misconduct during the strike," when in fact the stipulation read that the discipline was imposed for "alleged acts" of misconduct. We hereby correct this error. We note our agreement, however, with the Administrative Law Judge that the analysis of the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1981), is inapplicable to the issue of Respondent's discipline of strikers for alleged strike misconduct. See, e.g., *Garrett Railroad Car & Equipment, Inc.*, 255 NLRB 620, fn. 1 (1981).

[2] 246 NLRB 1143 (1979), hereinafter called *Emerson*.

[3] All dates are in 1980 unless noted otherwise.

peared on the picket line. As Fransen first indicated "public support" for the strike on February 22, the Administrative Law Judge was constrained under *Emerson* to terminate the remedy as of February 21, notwithstanding that Fransen was not cleared to return to work by her doctor until over a month later, on March 25. It is the Administrative Law Judge's latter finding with regard to the appropriate remedy that we now reverse. While we agree that Respondent's withholding of disability benefits to Fransen violated the Act, we now also hold that, once a disabled employee's benefits have been illegally cut off because of a strike, the disabled employee should be recompensed for those lost benefits until it has been determined either that the disability on which the benefits are based has ended, or the contractual right to receive such benefits has run out, whichever comes first. Here, we find that Fransen's benefits should have continued through March 24, the day preceding the date that Fransen was freed to return to work. In so concluding, we rely heavily on the analysis, set out below, which is consistent with the views of Member Jenkins in his separate opinion in *Emerson* as well as those of the Third Circuit Court of Appeals in that proceeding.[4] The reasons for our change of view follow.

In *Emerson*, the employer had terminated certain sick and accident benefits that it had been paying to disabled employees solely because other employees then actively employed at the employer had gone out on strike. In finding a violation, the Board overruled Board precedent[5] which held that an employer may reasonably conclude that employees who are on sick leave before a strike support the strike. In so concluding, the employer could rely on the facts that the strike was effective and the employees were union members, even though the employer had no way of knowing *with certainty* whether the employees on sick leave did, or did not, support the strike activities of their fellow employees. In rejecting that precedent, the Board in *Emerson* concluded that an employer could not rely on such speculative grounds to justify the termination of existing disability benefits to employees which had accrued to them as a result of past work performed. The Board found that disabled employees had a Section 7 right to refrain from declaring their position on a strike while they were medically excused, and that an employer could no longer require its disabled employees to disavow strike action during their sick leave in order to receive disability benefits. The Board concluded that to allow the termination of such benefits to certain employees as a result solely of the strike activities of others was to penalize employees who had not yet acted in support of the strike. The *Emerson* majority also concluded, however, that while disabled employees need not affirmatively disavow the strike action, neither could they participate in the strike without running the risk of forfeiting benefits prospectively, and the majority found that any disabled employees, who affirmatively demonstrated support of a strike by picketing or otherwise showing public support for the strike, had enmeshed themselves in the ongoing strike activity to such an extent as to terminate the right to continued disability benefits.

In sum, in *Emerson*, the Board majority held that for an employer to be justified in terminating any disability benefits to employees who were unable to work at the start of a strike it had to show that it had acquired information which indicated that the employees whose benefits were to be terminated had affirmatively acted to show public support for the strike. Barring such affirmative action, the disabled employees were entitled to disability benefits in accordance with the established benefits plan for the length of their sickness or disability.

In his dissent in *Emerson*, Member Jenkins agreed that a violation of the Act had been made out in the employer's termination of the sickness benefits due the employees. However, he disagreed with the remedy proposed by the majority. He found that the benefits were a form of compensation for past services and had fully vested upon the commencement of the employees' actual disability. Hence, he found no event, other than an employee's recovery, could terminate the employer's obligation to continue payments to employees on disability before the strike began.

Thereafter, the Board petitioned the Third Circuit Court of Appeals for enforcement of its Order in *Emerson* and both the employer and the union cross-petitioned for review of that Order. The court found that the employer's discontinuance of the disability benefits to disabled employees at the outset of the strike violated the Act. However, the court rejected the remedy proposed by the Board majority as inappropriate for the violation found. The court noted that the Board remedy—that no benefits should be paid once an employee demonstrated public support for the strike—was premised on the concepts that (a) such public support "enmeshed" the employee in the strike, and (b) an employer should not have to finance a strike against itself, or aid those who engaged in such a strike. The court, however, found that the basis of the

[4] See 650 F.2d 463 (1981), cert. denied 102 S.Ct. 1429, 109 LRRM 2778 (1982).

[5] See *Southwestern Electric Power Company*, 216 NLRB 522 (1975). While Respondent argues that we should return to that precedent, we decline to do so.

Board's *Emerson* decision was that the disability benefits involved there had accrued. The court noted that since an employer could not deny accrued benefits to strikers who were otherwise entitled to them, it also could not deny benefits to disabled employees merely because the disabled employees approved of, or participated in, the strike. The court also found that accrued disability benefits did not constitute unfair strike financing by the employer. The court went on to find that the Board majority's reasoning in *Emerson* on the remedy was also inconsistent with the Board's reasoning in *Abilities and Goodwill, Inc.*[6] The court noted that in *Abilities and Goodwill* the Board had refused to limit the remedy of an employee who, after being illegally discharged, engaged in strike activity, since the Board was unwilling to presume the absence of a connection between the employee's conduct in striking and the unfair labor practice. After noting this, the court in *Emerson* found that:

> Here where the employer's termination of the . . . benefits was found to be an unfair labor practice, it follows that such unlawful conduct may have induced strike participation and the employer should not be allowed to benefit from a presumption that its conduct did not induce the participation.[7]

The *Emerson* court also found that the Board majority remedy was inconsistent with Board holdings in other cases that an employee who pickets during off-duty time cannot be considered a "striker" against whom the employer can act.

The court recognized that an employer did not have to continue paying disability benefits when an employee was no longer disabled. Although the court noted that "[a]ctive participation in strike activity may be telling, or even presumptive, evidence of cessation of disability,"[8] it concluded that such activity standing alone does not necessarily establish the end of the disability but rather is one factor to be considered with others in determining when, as a matter of fact, the disability has ended. It expressly noted, however, that "use of the mere expression of public support for the strike by a disabled employee, such as one still in the hospital, as the basis for termination of benefits is inherently destructive of the employee's section 7 rights."[9] The court concluded that:

> [T]he Board's decision to end benefits on the basis of active participation or public support for strike activity cannot stand. It is internally inconsistent with the Board's own rationale in this case. It varies from the Board's policies as set out in previous decisions, and frustrates effectation of section 7 rights.[10]

In light of the court's comments, we are now persuaded that further adherence to the limited remedy established in the majority opinion in *Emerson* is inconsistent with our duty to remedy violations of the Act. Accordingly, to the extent that any cases provide for a remedy inconsistent with that set forth in this opinion, they are hereby overruled. Henceforth, in cases such as the instant one, where an employer because of a strike unlawfully terminates accrued benefits it has previously provided disabled employees, we shall order that employer to provide to such employees the amount of the disability payments, plus interest, that the employee otherwise would have received after the date the employer terminated the disability benefits. In so doing, we emphasize, as the Court of Appeals for the Third Circuit pointed out, that an employer remains free to challenge the disability of any employee engaged in active participation in strike activities.

Our dissenting colleague errs in claiming that we have ignored the terms of the agreement between Respondent and the Union which established the disability benefit plan. Under our colleague's view, the contractual provision that "No benefits will be paid during the time you are on strike or layoff" precludes Fransen from being eligible for benefits after February 22, the date she began picketing for the Union. However, as we have emphasized above, picketing for the Union, or otherwise participating in the strike, does not render an individual a striking employee. The key is whether that employee is withholding services from the employer in support of a labor dispute, and in this case Fransen was disabled from working until March 25. Until that latter date Fransen did not have the option to become a striker.[11]

[6] 241 NLRB 27 (1979), enforcement denied on other grounds 612 F.2d 6 (1st Cir. 1979).

[7] 650 F.2d at 474.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] Member Fanning suggests, in his separate opinion, that Fransen's entitlement to disability benefits terminated, by agreement of the parties, on February 22, when she commenced joining in strike conduct by walking the picket line. In substance, his position reflects adherence to the Board majority position in *Emerson Electric Co., supra*, which the court of appeals rejected in reviewing that decision, and which we now abandon. He attempts to buttress his position with an overlybroad construction of the factual stipulation here. As reflected in the Administrative Law Judge's Decision, the parties stipulated only that Fransen engaged in picketing from and after February 22. This does not, as Member Fanning would have it, amount to a stipulation that she was "on strike" as of that date or that her disability had ended and, for the reasons stated above, we find that neither occurred.

Continued

Based on the above, in the instant proceeding we shall order Respondent to provide employee Fransen with the disability benefits, plus interest, which Respondent unlawfully failed to give her for the period commencing January 9, 1980, through and including March 24, 1980, the last day of her disability.[12]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Conoco, Inc., Wrenshall, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(b):

"(b) Make whole employee Patricia A. Fransen by paying to her, with interest, the disability benefits pursuant to the Comprehensive Disability Income Plan which were due to her during the period from and including January 9, 1980, through March 24, 1980."

2. Substitute the attached notice for that of the Administrative Law Judge.

Second, Member Fanning construes the collective-bargaining agreement as terminating benefits to employees who engage in strike activity, regardless of whether their disability would otherwise preclude them from working, and hence preclude them from withholding their services from their employer. Because we do not accept Member Fanning's loose construction of the contract provision quoted above, we need not pass on the question whether Respondent and the Union could have agreed lawfully that disability benefits would terminate due to strike-related events. However, Member Fanning, in adhering mechanically to the conditions established in such plans, apparently would allow benefits to be terminated during any strike activity if the parties so agree. As noted by the court in *Emerson*, such a result would be inherently destructive of employees' Sec. 7 rights. (650 F.2d at 474.) In such a situation, the disabled employee would be unable to offer to return to work and would be enmeshed in the strike without choice for its duration.

[12] While there were no exceptions taken to the Administrative Law Judge's failure to grant a broader remedy than that detailed in the Board's *Emerson* decision, we note that we do have before us exceptions to the remedy he proposed, and we find the remedy we now order more fully effectuates the purposes of the Act and better fulfills our mandate under Sec. 10(c) of the Act. Further, we find no reason which would prohibit our applying his revised remedy retroactively. See, generally, *N.L.R.B.* v. *Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 757 (7th Cir. 1981). Moreover, in this case, Respondent is merely being required to pay an accrued benefit and the effect of our remedy is only to prevent unjust enrichment to Respondent by its retention of benefits due its employees. See *Emerson, supra*, 650 F.2d at 473.

Our dissenting colleague encounters problems with our ordering an expanded remedy here as he notes there was no corresponding unfair labor practice alleged in the complaint for this time period. That observation on his part is eminently correct as the law was not then what we now decide it is. But our ordering an expanded remedy here is nothing more than our applying retroactively a decision we reach here today. This is clearly within our province, and our dissenting colleague has, in fact, joined in similar determinations in the past. See, e.g., *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969).

MEMBER FANNING, concurring in part and dissenting in part:

I agree with my colleagues, for the reasons set forth in *Emerson Electric Co.*, that Respondent violated Section 8(a)(1) and (3) by discontinuing employee Fransen's disability payments at the commencement of the strike. I disagree, however, with their finding that Fransen was, pursuant to Conoco's disability plan, entitled to receive disability benefits until March 25, the date when she was certified to return to work, as opposed to February 22, the date it was stipulated she engaged in active participation in the strike against Respondent.

My initial disagreement with the majority is with their assumption that, as "accrued benefits," Conoco's disability plan, as well as all employer disability plans, require that payments be made until benefits are exhausted or the disability ends, regardless of the circumstances. While some employer plans might, others do not. Nor does Conoco's. Here, the benefits provided by Conoco's plan are "accrued" only in the sense that eligibility to receive them and the amount to be received are a function of an employee's length of service. However, the "right" of an otherwise eligible employee to receive, or to continue to receive, Conoco's disability benefits is contingent upon satisfaction of the particular conditions of the plan; i.e., that the employee, *inter alia*, be neither on strike[13] nor on layoff. Thus, the disability payments are not akin to a lump sum payment "due and owing" but, rather, are contingent upon present and future circumstances—the continued satisfaction of the plan's conditions.[14] I therefore cannot agree with my colleagues that, in all cases, an employer who illegally cuts off benefit payments at the commencement of a strike is obligated to reimburse employees for such benefits until either the exhaustion of benefits or the end of the disability, whichever comes first. While such a "rule" might be easy to apply, it ignores the simple fact that all employer disability plans do not provide the same benefits and are not subject to the same conditions. An employer should not be required to pay benefits where, pursuant to its plan, it would not have to otherwise. The resolution of the issue in each case requires an application of the facts to the terms of the plan involved.

Since Conoco's plan pays benefits only to disabled employees who are, *inter alia*, not out on

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[13] In this regard, I agree with the Administrative Law Judge's finding that Conoco's plan does not provide for termination of all disability payments at the outset of a strike but, rather, merely provides for the termination of payments to individual employees who are on strike.

[14] Simply put, what is "accrued" is only the right to receive that which the plan provides. Thus, had Fransen been placed on layoff, she would, pursuant to the plan, have an "accrued" right to nothing.

strike, the issue here is whether Fransen's appearance on the picket line on February 22 establishes that she was either (1) on strike or (2) no longer disabled. In holding that Fransen was not, in fact, on strike as of February 22, the majority concludes that any ambiguity must be resolved against Conoco and finds that Fransen's picketing may well have been a protest over the specific unlawful withdrawal of her benefits and, therefore, unrelated to the economic motives of other strikers. However, even assuming that Fransen was striking against unlawful termination of her benefits, it is well established that unfair labor practice strikers are no more entitled to pay than any other strikers. Nor does the fact that Fransen may have been reacting to an unfair labor practice directed at her personally change matters. In short, if Fransen were on strike, I find her reasons irrelevant.[15]

Contrary to the majority, I consider Fransen's picket line activity to be presumptive evidence of the fact that she was on strike.[16] However, *were that issue before us*, I would conclude that such presumption was rebutted by the record evidence that Fransen was not certified to return to work until March 25. Thus, I would find that Fransen, although healthy enough to walk a picket line, was not withholding from Conoco services which, under Conoco's normal practices and policies, Conoco neither required nor expected from her.[17] To conclude otherwise would be anomalous in light of Board precedent that an off-duty employee is not a striker against whom an employer can take action.[18] However, I do not think that finding is proper in this case, given the parties' stipulation that Fransen was actively striking on February 22, thereby precluding litigation of the issue.[19] For this reason only, I find that Fransen was on strike on February 22 and that, pursuant to the terms of Conoco's disability plan, she was not entitled to receive further payments. I agree with the majority in all other respects.

[15] *Southwestern Pipe, Inc.*, 179 NLRB 364 (1969).

[16] If Fransen were, in fact, on strike, the situation is not at all comparable to that of the discharged strikers in *Abilities and Goodwill*, 241 NLRB 27 (1978), to which the majority likens it. There the Board held that backpay, subject to offset for willful loss of earnings, accrues to discharged strikers from the date of discharge. But that is so because the employer has advised the employee that his services are no longer desired by discharging him. Termination of disability benefits, lawfully or otherwise, conveys no such message.

[17] There is no evidence that such medical certifications are not readily accepted by Conoco. In this regard, I agree with the majority that, generally, a disabled employee is incapable of striking. However, this does not mean that, in all cases, I would find a disabled employee entitled to continuously receive benefit payments until the benefits are exhausted or the disability ends. An employee's right to receive benefits depends on the particular provisions of the plan involved. This, for example where the plan effectively provides for cessation of payments for all periods during which the employee would not have "otherwise worked", an intervening event, e.g., a lawful layoff or lockout, may privilege a cutoff of such benefits; at least for such time as work would not have been available. Of course, Conoco could also have lawfully terminated Fransen's benefits upon establishing that Fransen could have returned to work, but elected to strike instead. *Abilities and Goodwill, supra* at fn. 5 therein.

[18] See, for example, *M Restaurants, Incorporated, d/b/a The Mandarin*, 223 NLRB 725 (1976). The fact that, generally, a disabled employee is incapable of striking does not, as Conoco contends, render meaningless the provision of its plan which states that benefits are terminated for employees who are on strike. Nothing precluded Conoco, for legitimate business reasons, from offering Fransen work which she was capable of performing and thereby placing her "disability" into issue.

[19] I also note that the complaint alleged only that Conoco's termination of Fransen's benefits for the period from the commencement of the strike until February 22 constituted an unfair labor practice. Since it was neither alleged nor contended that Conoco's failure to pay Fransen benefits subsequent to February 22 was unlawful, I see no basis for the majority's ordering that Fransen be reimbursed beyond that date. It appears from their explanation at fn. 11 and accompanying text, *supra*, that my colleagues either misapprehend, or have chosen to misconstrue, both the text and the clear import of my position here, as well as the parties' stipulation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT suspend, serve warning notices on, discipline, or otherwise interfere with, restrain, or coerce striking employees who do not engage in disqualifying strike misconduct.

WE WILL NOT withhold payments from, or otherwise discriminate against employees, in the exercise of their rights to engage in or refrain from engaging in protected concerted or union activities, including the right to strike, thereby discouraging membership in Oil, Chemical and Atomic Workers International Union, AFL–CIO, Local 6–659, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in their statutory rights under the National Labor Relations Act, as amended.

WE WILL make whole employees Tony Hackensmith and Harold Frank, whom we unlawfully suspended, by paying them their net backpay, with interest, and reinstitute their seniority and other rights of which we deprived them by virtue of our unlawful acts against them.

WE WILL make whole employee Patricia A. Fransen by paying to her, with interest, her disability benefits under our Comprehensive Disability Income Plan for the period January 9, 1980, through March 24, 1980, inclusive.

WE WILL expunge from our records all suspension or warning notices, and any references

thereto, relating to the January-April 1980 strike activities of Tony Hackensmith, Harold Frank, Douglas Utech, and Joel Rabideaux.

CONOCO, INC.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: Pursuant to a charge in Case 18-CA-6571 filed and served by Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local 6-569, herein called the Union, on February 20, 1980, and a first amended charge filed and served on or about April 28, 1980, a complaint was issued in Case 18-CA-6571 on April 28, 1980; and pursuant to a charge in Case 18-CA-6665 filed and served on April 24, 1980, by Patricia A. Fransen, a complaint was issued and served on or about July 8, 1980. On July 8, 1980, the Regional Director for Region 18 of the National Labor Relations Board issued an order consolidating cases, and on September 8, 1980, an amendment to the consolidated complaint which was thereafter further amended at the hearing. To all allegations in the complaints, Conoco, Inc.,[1] Respondent herein, filed timely answers. The complaint in Case 18-CA-6571, in substance, alleges violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act, because Respondent suspended or issued warning notices to certain of its employees for their alleged misconduct while they were engaging in an otherwise lawful economic strike commencing on or about January 8, 1980. The complaint in Case 18-CA-6665 alleges, in substance, that Respondent, in violation of Section 8(a)(1) and (3) of the Act, unlawfully suspended and discontinued sick leave payments, made pursuant to a contractually supported comprehensive disability income plan, to an employee without acquiring information showing that the employee, the Charging Party, Patricia A. Fransen, affirmatively acted in support of the above strike.

Pursuant to prior notice, this consolidated matter was heard in Duluth, Minnesota, on September 24 and 25, 1980. The General Counsel and Respondent were represented by counsel. All parties were provided opportunities to argue orally on the record, to present written and oral evidence, to call, examine, and cross-examine witnesses, and to make argument at the close of the hearing. At the conclusion of the hearing, the General Counsel and Respondent waived oral argument and thereafter submitted timely briefs.

Upon the entire record, including the briefs, and upon my observation of the demeanor of the witnesses as they testified, I make the following:

[1] The name of Respondent appears as amended at the hearing, the original appearance being Continental Oil Company.

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The complaint alleges, Respondent admits, and I find that Conoco, Inc., a corporation with an office and place of business in Wrenshall, Minnesota, is engaged in the business of refining and selling petroleum products. In the 12-month period ending December 31, 1979, in the course of its regular business operations, it sold and shipped from its Wrenshall, Minnesota, facility products, goods, and materials valued at in excess of $50,000 directly to points outside the State of Minnesota, and, in the same period, purchased and received at the aforesaid Wrenshall facility products, goods, and materials valued at in excess of $50,000 directly from points outside the State of Minnesota. Respondent admits, and I find, that, at all material times, it was and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local 6-659, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent maintains a refining facility in Wrenshall, Minnesota, and a nearby (about 6 miles away) terminal, both in Carlton County, Minnesota. It employs about 94 employees in a unit, represented by the Union, of all production and maintenance employees of the Wrenshall refinery. The Union was certified as the statutory representative in that unit following a Board-conducted election in 1953. Unit employees, pursuant to a collective-bargaining agreement in effect for the period January 8, 1979, through January 7, 1981, are obliged to become and remain members of the Union 30 days after the beginning of their employment or 30 days after the effective date of the agreement, whichever is later.

In the period since 1953, the Union has engaged in three strikes against Respondent: in 1969, for 100 days; in 1975, for 19 days; and in 1980, the instant strike, for 85 days commencing January 8, 1980, and ending at the close of April 1, 1980. The employees returned to work on April 2, 1980.

The complaint in Case 18-CA-6571 names eight employees who are alleged to be the subject of unlawful discrimination by Respondent: five received 15-day suspensions (with written "suspension" notices) allegedly for picket line misconduct during the strike and three others were issued mere warnings and reprimands for similar alleged misconduct. The notices of discipline issued during the strike. It was stipulated that all eight of the alleged discriminatees were unit employees of Respondent during the period of the strike; that in the period January 8 through April 1, 1980, an economic strike of the unit employees took place in which the dis-

ciplined employees participated to Respondent's knowledge; and that the discipline of each of the eight employees was for an act or acts of misconduct during the strike.

On the basis of the above-noted stipulation, and the General Counsel having submitted in evidence the eight suspension and warning notices issued by Respondent to each of the employees, the General Counsel rested. Upon Respondent's motion to dismiss, I ruled that the General Counsel had proved a *prima facie* case of violations of Section 8(a)(1) within the meaning of *N.L.R.B.* v. *Burnup & Sims, Inc.*, 379 U.S. 21 (1964); *Rubin Bros. Footwear, Inc.*, 99 NLRB 610 (1952). I continue in that ruling.[2] The Board has recently restated and reaffirmed the law in this area: *General Telephone Company of Michigan*, 251 NLRB 737 (1980).

Thereafter, Respondent adduced evidence, in accordance with the procedure outlined in *Burnup & Sims* and *Rubin Bros. Footwear, supra*, whereby it sought to demonstrate that its discipline of the eight employees occurred in consequence of its honest belief that the employees had engaged in such serious misconduct against its property while engaged in the economic strike as to withdraw the protection of the Act from the employees' otherwise protected concerted activities. If Respondent meets this burden, the General Counsel must establish that the employee did not engage in such conduct or that the misconduct was so trivial as to not justify the discipline. *National Aluminum, Division of National Steel Corporation, supra*; *General Telephone Co. of Michigan, supra*. Thus, not every act of misconduct deprives the employee of the protection of the Act; and, even in the presence of substantial misconduct, the individual employee must be identified as a participant rather than have the acts of others imputed to him because of his mere association as a striker. *Coronet Casuals, Inc.*, 207 NLRB 304, 305 (1973); *American Cyanamid Company*, 239 NLRB 440 (1978).

The complaint alleges, and Respondent admits, that five employees (Glowacki, Hackensmith, Houle, Frank, and Archambault) were issued "suspension notices" on various dates in the period January 12 to March 24, 1980, and each of them suffered a 15-day suspension without pay upon their return to work after April 2, 1980.

1. Victor Glowacki; January 10, 1980

Respondent's witnesses supporting the case against Glowacki were Medaris and Henry (Dave) Haggard. Medaris and Haggard, statutory supervisors, are terminal superintendents who, at material times, were employed by Respondent in Lincoln, Nebraska, and Phillipsburg, Kansas, respectively, in January 1980, when the strike began in Wrenshall. With the advent of the strike, they, and other supervisors, were assigned to "strike duty" at Wrenshall where they performed the function of the striking employees. For them, this required their loading at the refinery and driving loaded trucks (loaded with various types of petroleum products including heating oil, jet fuel, gasoline and propane) from the refinery to the terminal. At the terminal, other, nonstriking Respondent employees would take over the loaded trucks and make deliveries to Conoco customers. These supervisors would also drive the empty trucks from the terminal to the refinery for loading.

Medaris testified with regard to an incident of January 10, 1980, where at or about 5 p.m., a period he described as dusk (Haggard testified that it occurred around 7 to 7:15 p.m.), while driving from the terminal to the refinery, in the process of a left turn across the median in the road to the refinery entrance, he stopped at the gate (pursuant to an outstanding state law requiring trucks to stop at an entrance picket line rather than going directly through the line). As he pulled through the gate, he saw three pickets, one on the left and two on the right. One of the pickets, wearing a black snowmobile suit with yellow stripes down the sleeves, walked from in front to the right side of his truck with his hands behind his back. Through his rear and right-side windows, Medaris noticed him carrying a white Styrofoam object. Then, through the window and rear mirror, he saw him bend over at a point 8 feet behind him and between the front and rear tractor wheels. Medaris said that he saw the picket make an underhand throwing motion, and, believing that the picket was throwing nails under his tires, Medaris spun his wheels. This procedure was designed to flip any nail and prevent tire penetration. Nevertheless, as he drove through the picket line and thereafter stopped, he discovered two nails in the right tractor tire. When he took the nails out of the tires, the nails having not penetrated, he saw them supported by a cardboard device which held them erect. He then went to the guard shack and reported the matter to Respondent's chief of security, Romeo Garcia. Garcia and Medaris walked over to the truck where Medaris showed him the nails and pointed out the picket who he had seen make the flipping motion at his tires and asked Garcia if he knew who it was. Garcia said that he did not know who it was. Garcia testified that because the man in the black suit with the yellow stripes on the sleeves was on the picket line on numerous occasions thereafter, and was pointed out to him, he thereafter learned his name to be Victor Glowacki.

[2] Respondent's brief notwithstanding, nothing in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1981), or *Mt. Healthy City School District* v. *Doyle*, 429 U.S. 247 (1977), is to the contrary. While both decisions, directly or indirectly, concern the burden and quantum of proof in cases alleging unlawful discrimination in violation of Sec. 8(a)(1) or (3) of the Act, neither of them suggests a *sub silentio* reversal or modification of *Burnup & Sims*. In any event, until such time that the Board directs its judges to a strike misconduct analysis other than that of *Burnup & Sims*, I am obliged to follow the Board's direction. The Board appears to continue to analyze these cases under *Burnup & Sims: Latex Industries, Inc.*, 252 NLRB 855 (1980); *General Telephone Company of Michigan supra*.

Insofar as Respondent would distinguish *Burnup & Sims* on the ground that here there were mere disciplinary suspensions and warnings rather than *discharges*, as in *Burnup & Sims*, the Board, as the General Counsel notes, has rejected that distinction. *MP Industries, Inc. et al.*, 227 NLRB 1709 (1977); *American Cyanamid Company*, 239 NLRB 440 (1978). Until the Board directs that a *prima facie* case must include a showing of explicit motivation to punish the strikers for engaging in the strike, I will abide by the Board rule. *General Telephone Co. of Michigan, supra; National Aluminum, Division of National Steel Corporation*, 242 NLRB 294 (1979).

In fact, while Medaris was driving into the entrance, Henry "Dave" Haggard was driving 100 yards or so behind him. Notwithstanding that Medaris stopped before entering the picket line and, though Haggard had an opportunity to see Medaris stop at the picket line, he saw no one doing anything with regard to the right side of Medaris' truck. That side of the truck, according to Haggard's position, trailing Medaris, was obscured from Haggard's vision. Following Medaris' truck by a minute or two, Haggard turned left across the highway into the entrance and stopped at the picket line as had Medaris. Haggard looked in his right rear mirror and saw a man throw something under the wheels of *his* truck. He described the man as wearing a black snowmobile suit with yellow stripes on both sleeves. He testified he thereafter found nails in his right rear trailer tires. The nails, some 5 to 6 inches long, were stuck in a two-by-six piece of Styrofoam. He reported this to Garcia but could not recall a conversation with Medaris. Medaris testified that he approached the truck while Haggard was stopped and said that Haggard would find nails in his tires.

Romeo Garcia, Respondent's chief of security, testified that Medaris, after 7 p.m. on January 10, came into the guardhouse on Respondent's property about 100 feet or more from the gate entrance area and said that the picket in the black snowmobile suit with yellow stripes threw nails at his tires. He went outside with Medaris and inspected the tires and returned to the guard shack. Garcia was unclear whether he asked co-employee, Stanley Tischer, a guard in the shack, whether he knew the fellow in the black suit with the yellow stripes, but he says he asked it of someone and that someone told him that it was Victor Glowacki. In any event, he said that he saw Glowacki on the picket line numerous times after January 10, and, independently, learned Glowacki's name.

Glowacki, employed by Respondent for 20 years, was a picket on January 10 and was at the picket line until about 5:30 to 6 p.m. when he was arrested by a Carlton County sheriff and jailed in the St. Louis County jail overnight. Thereafter, he never appeared on the picket line and only once, on or about January 13 or 14, visited the picket shack across the road from Respondent's refinery where he met his lawyer, and thereafter, later the same day, retrieved his car. Glowacki admits being on the picket line, wearing a black snowmobile suit with yellow stripes, and being present when two trucks came in behind each other on January 10 and parked near the guard shack. In particular, Glowacki denied having any nails in his possession and particularly any cardboard with nails, and denied throwing nails or having Styrofoam in his possession or bending over or engaging in any throwing motions. Glowacki testified that he thereafter picketed only at another Respondent facility, 10 miles from Wrenshall. Thus the General Counsel argues that Garcia should be discredited on the ground that Garcia testified that he saw Glowacki on numerous occasions thereafter at the Wrenshall picket line when the otherwise undisputed testimony demonstrated that Glowacki, with perhaps one exception, did not appear at the Wrenshall picket line after January 10.

There was evidence that other pickets wore dark snowmobile suits and some of them had colorations on the sleeves. There was no testimony that any of the snowmobile suits had yellow sleeves which Glowacki admitted that his suit possessed.

At the hearing, it appeared that Respondent's personnel, at both the refinery and the terminal, kept in their possession the objects which caused damage to the tires and other Respondent property. Although Respondent submitted into evidence examples of the nails that it found on or near its property, Respondent submitted no nails which, in fact, allegedly caused injury to Respondent's tires, notwithstanding that it appears to have had these nails in its possesion at one time. In view of the fact that Medaris testified that the incident occurred at or about 5 or 6 p.m., and Glowacki admitted that it occurred between 5:30 and 6, I would readily disregard Haggard's recollection that it occurred sometime between 7 and 7:30 since recollections of time "at dusk" are often notoriously untrustworthy. However, Respondent failed to submit, or in fact use, any of the many reports executed by its personnel, including Haggard and Medaris, to indicate time or other particularities.

In my observation and evaluation of the witnesses, I estimated that Haggard, in particular, appeared to me to be a credible witness notwithstanding that his powers of observation and recollection were, perhaps, of the least accuracy among Respondent's three witnesses. On my observation and evaluation, particularly of Haggard, and measuring the testimony of Medaris and Garcia on the one hand as against Glowacki's denials, I remain impressed by Haggard who said that he saw the picket, ultimately identified, to my satisfaction, as Glowacki, make a bending and throwing motion at his right rear trailer tire and that he saw this in his mirror. Crediting Haggard, I also credit Medaris and, to the extent of Medaris' and Haggard's testimony, I also credit Garcia.

I reject the General Counsel's argument that the height and position of their trucks and tires necessarily obstructed Medaris' and Haggard's ability to observe Glowacki's actions at the rear of the passenger sides. While there may have been obstructed vision, such a state does not proscribe Haggard's and Medaris' movements inside the truck to observe Glowacki, especially as here, when they have stopped moving. More unreliable was Garcia's testimony identifying Glowacki. But for Glowacki's admission that he was wearing the very clothing on January 10 when the two trucks drove in, I would be unimpressed with the fact that a black-suited, yellow-striped individual engaged in this conduct, since, contrary to Garcia, Glowacki appears not to have been at Wrenshall line after January 10. Moreover, other pickets wore the same or similar striped clothing.

On the other hand, it is not necessary to have direct evidence of Glowacki's acts. The present credited circumstances are sufficient for Respondent's "honest belief" of Glowacki's acts. I thus find and conclude that on the night of January 10, 1980, Respondent had an honest belief that Glowacki threw or placed nails at the tires of Medaris' and Haggard's trucks. While the nails implanted in Medaris' truck tires were plucked out with-

out penetrating, Haggard testified that the nails in his tires penetrated the tire, and that, by the time he got parked at the refinery, his trailer tire had gone flat.

On January 12, 1980, Respondent issued a suspension notice to Glowacki in which it notified him that he would be suspended for 15 working days when the strike was over because of his January 10 conduct which resulted in tire damage of $313. Respondent failed to support its assertion that the transport tire was either destroyed or damaged in the sum of $313, but Respondent proved, to my satisfaction, that it had an honest belief that Glowacki caused a flat tire in Respondent's truck as it was returning empty from the terminal into the refinery.

In the absence of any proof by the General Counsel that the 15-day suspension and the restitution of $313 for the tire were unduly harsh so that such punishment could be ascribed to motives other than the placing of the nails in the tire and, in particular, to a motive whereby Respondent intended to punish Glowacki for engaging in protected concerted activities rather than for the damage to the tire, I conclude that Respondent's motivation was not unlawful. Nor do I regard Glowacki's conduct as either trivial or an isolated incident of animal exuberance on the picket line, *Milk Wagon Drivers Union, etc.* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941). I regard the dropping of the nails on two occassions (against Medaris' truck and against Haggard's truck) to be a matter of studied mischief against heavy operating vehicles carrying petroleum products which could have consequences well beyond those envisioned by the perpetrator, *Gold Kist, Inc.*, 245 NLRB 1095 (1979). I therefore conclude that although the chain of evidence was conclusive neither in the production of the nails which caused the damage[3] nor in Garcia's flawed corroborating identification of Glowacki as the particular picket in the black snowmobile suit, I nevertheless conclude, crediting in substance Respondent's witnesses, Medaris and Haggard, and discrediting Glowacki, that Respondent had an honest belief that Glowacki threw or placed nails at its truck tires and I conclude that this activity was not protected under the Act. I further conclude that the General Counsel has failed, by preponderance of the credible evidence, to prove that, in fact, Glowacki did not throw the nails at Medaris, and Haggard's trucks on the night of January 10, 1980. I shall therefore recommend the dismissal of the complaint with regard to the Glowacki suspension.

2. The four disciplines of February 8, 1980

Bearing the date February 8, 1980, Respondent issued a disciplinary notice to Tony Hackensmith (a 15-day suspension) and three warning notices individually to Douglas Utech, James Jensen, and Joel Rabideaux.

a. *Tony Hackensmith*

Respondent's February 8 notice of 15 days' suspension (G. C. Exh. 9) to Hackensmith asserts that, on February 5, Hackensmith damaged tires of three trucks by placing nails in the paths of the vehicles. Richard Clabough, a Respondent terminal supervisor from Tulsa, Okalahoma, testified he was called to strike duty at the Wrenshall refinery and drove a truck. In the evening of February 5, he recalled that, while driving out of the refinery, he was faced by three pickets to the right, left, and corner of his truck. He saw the picket in the center walk over to the left of his truck and make an underhand throwing motion. He saw no object actually thrown and the other two pickets were not in his view since he was watching only the center picket who, as he was leaving, was now on his left side. The three pickets were distinctively dressed. One had a blue coat with a hood, the other a black suit, and the third a stocking cap. While Clabough recalled clearly that it was the center picket who came to the left side of the truck and made the throwing motion near his left front tire, his testimony demonstrated (and I saw that he was a credible witness) that he was not at all sure whether it was the picket in the blue coat or the picket with the stocking cap or the picket in the black suit. On the witness stand, by a process of deduction and elimination, he arrived at the conclusion that it was the picket in the blue coat. In any event, he drove the 6 miles to the terminal, pulled into the garage, and had other employees at the terminal check his tires. The left front tire and the right outside front tire had nails in them. It appears from Clabough's testimony, therefore, that two tires were damaged: the left front end one, the outside right front. Carrying the date of February 8, Respondent issued a 15-day suspension notice to Hackensmith noting that he had damaged the tires of three truck transports, specifically damaging the tires of a company transport by putting nails or similar device in its path. Far from the fact that there were neither three tires damaged nor three truck transports damaged, the particular problem is with the identification of Hackensmith.

Garcia testified that, at or about 10 p.m., the guard shack radio operator (a Pinkerton guard employed by Respondent at Respondent's refinery) called in by radio to his hotel room. Garcia went to the terminal but first called the sheriff. They arrived at the terminal at the same time and found Clabough there. The sheriff took the nails. Clabough, according to Garcia, was not sure of the identification of who threw the nails under the tires. Back at the refinery, Clabough was still not sure of the identification but said that maybe he could arrive at identification through a process of elimination of which picket was standing where. Thereafter, a deputy sheriff arrested Hackensmith and charged him with criminal damage. The arrest was on the basis of statements taken from Pinkerton guards and then the arrest followed.

Since the arrest was made on the basis of statements by the Pinkerton guards who did not testify in the instant proceeding and whose absence was unexplained, and in view of the fact that, as I watched Clabough, a credible witness, attempt to identify the occupant of the blue jacket with the hood who allegedly threw the nails under his tires, it was clear that his identification was as unsure as it was previously. I am unable to conclude that on this record Respondent had a good-faith belief that it was Hackensmith who threw nails or similar devices under its truck driven by Clabough, or any other truck,

[3] Respondent would ordinarily reasonably cause the nails to be kept.

on the night of February 5. Hackensmith was thus identified as neither a perpetrator nor supporter of a picket who apparently threw nails at some trucks.

While Hackensmith was not called by the General Counsel to deny that he threw nails, certainly on the testimony of Clabough, I was not satisfied that, by a preponderance or any measure of the evidence, Respondent proved that Clabough identified Hackensmith as a picket who threw the nails under his or anyone else's tires or even was the picket wearing the blue coat or, more important, was the picket wearing the blue coat who threw the nails. Furthermore, while I am impressed by the fact that there were nails in tires both on the left side and the right side of Clabough's truck and, *arguendo*, Hackensmith was allegedly only on one side, I note that the identification of Hackensmith by the sheriff for some act of "criminal damage" to property was made on the basis of information outside of the record produced at this hearing and in particular was made by Pinkerton identification in the sheriff's office.[4] No Pinkerton statement was produced, no Pinkerton agent was produced, and no sheriff or deputy sheriff testified with regard to this incident. On the basis of the record before me, I am unable to conclude that Respondent, by a preponderance of the credible evidence, showed that it had an honest belief that Hackensmith was the prepetrator or, if not the nail thrower, a supporter or abettor of the nail thrower. Respondent suggests no facts to the contrary. It is therefore not necessary for the General Counsel to prove that Hackensmith, in fact, did not perform the act. *National Aluminum, Division of National Steel, Corporation, supra*, 242 NLRB 294. I conclude that Respondent violated Section 8(a)(1) of the Act by suspending Hackensmith for 15 days without pay in April pursuant to its February 8, 1980, letter.

b. *The discipline of James Jensen: A warning letter dated February 8, 1980*

The discipline of James Jensen was a warning letter dated February 8, 1980. It relates to conduct allegedly occurring on January 31 and February 2 during the strike. On January 31 he was identified by Garcia, based solely on the statement of a nonemployee truckdriver, as having placed nails in the path of vehicles entering or leaving the refinery; on February 2, 1980, he was identified as having been involved in harassment of a truck transport on a public highway by repeatedly flashing his lights from high beam to low beam while following a Respondent truck departing the refinery.

The testimony adduced with regard to the nail incident of January 31 was supported by only the purest hearsay and there was no attempt by Respondent to secure, or explain its failure to secure, the testimony of the driver of the truck involved in the incident. I refused, and continue to refuse, to receive such testimony as evidence even of Respondent's honest belief. To permit an absolving finding of honest belief based on such hearsay, especially, as here, where the failure to secure the participant is unexplained, would be to open the door to possible impropriety.

The other incident for which Jensen was disciplined was that on the night of February 2, 1980, Jensen followed in his car, from refinery to terminal, a Respondent truck driven by Clabough and flashed his headlights to and from high beam to low beam. Clabough stopped and Jensen stopped 100–200 yards behind him. When Clabough proceeded, Jensen again followed and resumed his high-beam, low-beam flashing. This incident covered about three-fourths mile.

Thereafter a deputy sheriff issued a traffic violation citation to Jensen. Jensen did not testify.

The General Counsel notes that strikers who follow nonstrikers in vehicles, "without more [sic]," do not engage in serious misconduct, citing *Advance and Machine Pattern Corporation d/b/a Gibraltar Sprocket Co.*, 241 NLRB 501 (1979). The problem, as the General Counsel apparently notes, is his additional phrase "without more." Strikers who endanger the driver, vehicle, and other users of the road by intentional or reckless acts are subject to discipline. *Gold Kist, Inc.*, 245 NLRB 1095.

Since Jensen did not testify, it appears that, whether or not Jensen intended to temporarily blind Clabough by flashes of his high beam, the effect of his conduct might well include that result. Such harassment, at night, of the driver of a truck loaded with petroleum products[5] endangers the driver, the truck, and other innocent users. It should not be condoned as a playful or high-spirited act of animal exuberance. I conclude that Respondent's warning was based on honest belief of substantial misconduct and that the complaint be dismissed as to Jensen.

c. *Douglas Utech*

Supervisor Garcia testified that he had only a vague recollection of the time of day of the Utech incident. Bearing the date of February 8, 1980, Respondent's warning letter to Utech states that he engaged in activity on January 29, 1980, which might result in his suspension at the end of the strike, which activity was identified as Utech placing nails in the path of vehicles entering or leaving the refinery.

Garcia testified that while in the guard shack in the refinery he observed Utech alone on the picket line and saw him "arranging" something with his feet. When he saw this, he caused two Pinkerton agents to leave the guard shack to check for nails but their attempts led to no discovery of nails or other device. After Utech left, the guards (including a female guard) again checked for any items on the ground and at this time returned with a "nail." Garcia could not recall the nature of the nail whether it was a roofing nail or larger. In any event, neither the alleged nail nor the alleged finder was produced nor the failure to produce either explained. Garcia identified various nails that were found during the strike and particularly (Resp. Exh. 1) a sharpened, twisted piece of hard metal whose configuration was of two points at right angles to each other. When dropped or even kicked

[4] The record before me fails to disclose whether Hackensmith was arrested because of the Clabough truck incident. Respondent's brief does not suggest any such connection (br., p. 19).

[5] Trucks traveling *from* the refinery to the terminal are loaded.

on the ground, the tendency was for one point to bear upwards on a stable base.

Utech testified that he was indeed on the picket line on January 29 between 4 and 8 p.m. At or about 4 p.m., he said that there were usually two guards in a car near the fence where the picket line was established. Utech denied having nails in his possession and denied placing nails on the ground or using his feet to place nails on the ground. He admitted that he often shuffled his feet to keep warm and also to play with the snow. He testified that he was fixing his shoes and fooling with the snow at or about 8 p.m. on January 29 and did this in order to have Respondent's radio operator in the guard shack notify the Pinkerton agents in the car (and other receivers of Respondent's radio signal) that a picket was fooling with the snow and perhaps dropping nails in the snow. In any event, after Utech had squatted down and adjusted his boot and "fiddled" with the snow, the guards came out and inspected the area. He said that they found nothing and walked back to the guard shack. Indeed, he testified that one of the Pinkerton guards, a female named Marlene, picked up two handsful of snow and walked back to the guard shack with them.

As above noted, Garcia did not produce the nail that the Pinkerton guards allegedly found. In view of this fact, and notwithstanding that I observed Utech's demeanor to be smart alecky and, indeed, he admitted engaging in a device to insure a radio signal which the pickets in the picket shack across the road from Respondent's refinery were supposed to pick up in order to monitor Respondent's radio messages to its guards, I am not satisfied on the credible and admissiable evidence presented (and that which might have been presented) that Respondent indeed found a nail as a result of a search in the immediate area in which Utech squatted down, fixing his boot, fiddling with the snow.

A first patrol of the area failed to disclose a nail notwithstanding Utech's positions were under direct observation. Thereafter, Pinkerton guard Marlene went only to the same general area, and looked in the snow in the general area where Utech was patroling. Garcia said that she came back with a nail that was not produced. Of course, he could hardly testify that he saw her pick up a nail. I am not satisfied either with the failure to call Marlene (the Pinkerton guard) or to produce the nail or explain its absence. In view of Utech's specific denials and notwithstanding his smart alecky testimony, I conclude that he was fully capable of deceiving and actually acted to deceive Respondent and that Respondent has failed to adduce specific evidence to support its assertion that Utech was in fact placing nails in the snow. Failing to produce, or explain its failure to produce, the guard or the nail is a glaring defect in proving Respondent's goodfaith or honest belief. Further, I credit Utech's actual denials and conclude that, in fact, he did not at that time place nails in the snow as alleged by Respondent. I therefore conclude that, as alleged in the complaint, Respondent violated Section 8(a)(1) of the Act by issuing a warning notice to Utech for such conduct allegedly occurring on January 29, 1980.

d. *Joel Rabideaux*

The sole testimony regarding Rabideaux came from Garcia. In support of its February 28 warning notice to Rabideaux, for placing nails or other devices, designed to cause damage to tires, in the path of truck transports leaving the refinery on January 28, Garcia testified that, about 1 month after the strike began, he thought he saw Rabideaux "arranging something with his feet" at the center of the entrance gate. He told the guard, Stanley Tischer, to observe Rabideaux's activity which was about 75 to 100 feet distant from the guardhouse in which Tischer and Garcia were standing. Garcia testified that Tischer looked through binoculars to observe Rabideaux's actions. Garcia told Tischer that he thought that Rabideaux was "setting up a nail." Neither Tischer nor Garcia saw Rabideaux drop a nail into the snow near the gate. Instead, Garcia directed the Pinkerton radio operator in the guardhouse to go out and inspect the area. He said that she leaned down and searched the area and returned with a 1-1/2-inch roofing nail in a piece of cardboard.

Rabideaux testified that, although he picketed the area on January 28, he did not use, arrange, or drop any nails on the pavement, denied using his feet to set up any nail or puncturing device in the gateway, and asserted that guards in a nearby Pinkerton car at the gate were there at all times. He said that the radio operator came out to inspect the area, looked over the grounds, kicked the snow where Rabideaux had been walking and picked up some snowballs and walked back to the guard shack.

In view of Rabideaux's denial, I am unable to credit Garcia's testimony in view of the fact that neither Tischer nor the Pinkerton radio operator (Marlene) nor the nail was produced. While I do not suggest that Pinkerton guard Marlene was guilty of any wrongdoing, the burden of showing, for purposes of supporting Respondent's honest belief, that a nail was found in the area where Rabideaux was patroling rested on Respondent, regardless of whether the production of the nail would be sufficient proof that Rabideaux was responsible for deploying it. But even if the circumstances of finding the nail were linked with Rabideaux's presence so that Rabideaux would be responsible for dropping the nail, no proof exists except the indirect testimony of Garcia. Both corroboration and stronger testimony existed: the testimony of the participating Pinkerton guard (Marlene) and of Tischer who allegedly held Rabideaux under observation with his binoculars. Although Tischer was called as a Respondent witness, he testified on only one subject and that one subject did not relate to Rabideaux. In view of his alleged conspicuous participation in the Rabideaux incident, Tischer, a witness who might ordinarily be thought favorable to Respondent, should have been called as well as the radio operator. In any event, the nail should have been produced which the radio operator (Marlene) went to considerable effort to discover. In view of the failure to produce the nail or the radio operator or to have Tischer testify to the event, notwithstanding he testified at the hearing, I not only credit Rabideaux's denial, but also, as a preliminary matter, conclude that Respondent has failed even to produce suffi-

cient credible evidence to support its alleged honest belief that Rabideaux was responsible for the setting up of a nail. I therefore conclude that, as alleged in the complaint, Respondent violated Section 8(a)(1) of the Act by issuing its February 8, 1980, warning to Rabideaux with regard to the above January 28 incident.

3. George Houle

By letter dated February 13, 1980, George Houle received a suspension notice for 15 working days because of conduct on February 11, 1980. This conduct included the twisting of signal lights and mirrors, the removal of a truck's fuel cap as the Conoco transport entered the refinery and thereafter opening the drain valve on a departing trailer, leaving only the dust cap as a protective device; and removing the radio antenna from a Pinkerton car. Michael Paul, a Respondent supervisor who was engaged in replacement-driver strike duty on the evening of February 11, 1980,[6] testified that, as he stopped at the picket line while entering Respondent's refinery, a picket later identified as George Houle stepped in front of the truck and, proceeding to the left side, put his hand on the fender signal light and twisted it. Houle then approached the driver's door, cursed Paul, twisted the left outside mirror on his truck, walked around the truck, and twisted the outside right-hand mirror; then removed the right-hand side fuel cap from the truck leaving the cap dangling on a chain. Although Paul did not see him remove the cap, the circumstances suggest, and I find, that the only person who went to the truck's right side between the time that Paul left the terminal with the fuel cap properly set, and this incident when Paul found it dangling thereafter, was Houle. I do not credit Houle's denial and his assertion that he merely made signs to remove the gas cap and never actually did so. I further reject his testimony that he made these signs of removal on the driver's side and never went to the passenger side to remove the fuel tank cap. Similarly, I reject his statement that he merely wiped off the signal lens on the left-front fender and did not twist it. The parties are not in dispute that Houle did not do damage to the signal light or the mirrors which he admits twisting on both sides of the truck cab.

In view of the findings made hereafter, however, it is unnecessary to evaluate the seriousness of this Houle misconduct, above, or of any suspicious severity of Respondent's punishment therefor.

The evidence further shows that at or about 20 minutes after this incident, while Paul was loading heavy number six (#6) oil (heating oil) at the refinery, this loading being about 100 yards from the gate, Paul saw the same picket (Houle) who had wrenched his signal light and removed the gas cap open the discharge valve at the rear center of a loaded oil truck leaving the refinery. This meant that the only covering of the discharge pipe was a dust cover which would prevent leaks or the discharge of oil through the open valve. According to the credited testimony at the hearing, contrary to Respondent's suspension notice to Houle (G.C. Exh. 10) there was little likelihood of oil spilling in transit from the open valve in view of the positioning of the dust cover. On the other hand, the evidence shows that after delivery to the terminal, the driver who would take over the loaded truck and, removing the dust cover, attempt to connect the discharge hose to the drainpipe would have his hands met with a quart or more of number six oil heated to over 200 degrees Fahrenheit. As explained at the hearing, this would be the amount of oil that could reasonably be expected to be positioned in the pipe manifold between the dust cover and the unexpectedly "cracked" valve.

When Paul saw the picket (later identified as Houle) "crack" the valve on the departing truck, he notified Respondent's security service which thereafter notified the driver who was to accept the truck to secure the valve. Paul then finished loading his own truck, and left the refinery. Although he stopped at the picket line while exiting the refinery, he saw no one touch his truck. While driving from the refinery to the terminal, he was notified by radio of a defect in his truck and two employees of Respondent (from the terminal) stopped him on his way to the terminal and told him that someone had removed the dust cover from the discharge valve on the right side of his truck. The valve had not been opened.

Although other pickets wore black snowmobile suits, some with yellow stripes, which was the attire of George Houle on the night of February 11, Stanley M. Tischer, Respondent's guard, recalled that it was Houle whom he saw open the right-side valve on Paul's truck that night. He credibly testified that Houle, a large man, could be easily identified by him apart from the particular costume he was wearing that night because of the brightly lit conditions and Houle's size. Thus Tischer apparently corroborates Paul[7] and I credit Paul and the corroboration. While it appears that even "cracking" the valve would not cause large spillage of heating oil, yet the unsuspecting driver who attempts to connect his hose to the open discharge valve would, upon removing the dust cover, risk being burned by hot oil.

Since I credit Paul's identifying Houle opening the discharge valve on another departing truck on February 11, 1980, and since such act might cause hot oil to spill on the unsuspecting remover of the dust cover, I conclude that Respondent had an honest belief that Houle's act was unprotected, could be the subject of the 15-day suspension, and was not violative of the Act, as alleged. I shall recommend that the complaint, as to Houle, be dismissed. The General Counsel failed to prove Houle's innocence.

4. Harold Frank

By a suspension notice dated February 14, 1980, Respondent suspended Frank for a period of 15 days following his return to work because of conduct occurring at or about 9 p.m. on February 12, 1980. This conduct,

[6] The evidence shows that the area was well lighted.

[7] While both witnesses placed Houle at the right-side valve, Paul testified that the dust cover was removed but his valve was not opened. Tischer said he saw Houle open the valve by spinning it open. While it is not clear that more than one oil transport may have been subject to Houle's attention, I was impressed by Paul's testimony and demeanor apart from Tischer's possibly inconsistent observations.

according to Respondent, was Frank's placing a nail or similar device in the path of a rental car being used by Respondent's security employees. Frank's action allegedly caused the left front tire of the vehicle to go flat almost immediately.

Respondent produced no witnesses in support of this assertion.

Frank testified that although he was on the picket line on February 12 and notwithstanding that a Pinkerton car did pass through the line and got a flat tire as it was leaving the refinery, the car left the refinery and returned after being out on the highway. He denies having seen the tire going flat and denies putting a nail in the highway although he was with others on the picket line at the time that the car exited. He said that he was at the picket shack 15 minutes before the Pinkerton car exited and admits that he heard air going out of the tire as the car was returning from the highway. He testified that the front tire on the driver's side was leaking air as it came in and that he later saw the tire being changed. He did not recall that anyone yelled at the Pinkerton car, as it was leaving, that it was going to "get a flat."

There is a failure of proof by which Respondent supported its assertion that it had an honest belief that Frank was responsible for or shared in this misconduct on the picket line. There is no proof that he placed the nail in the path of the car and there is no proof that he participated in that conduct even if another did it. The only evidence is that the car was out on the highway and returned with a leaking tire. I am not necessarily suggesting that the tire became flat out on the highway rather than as it was exiting the refinery. I conclude that there is no proof linking Frank with any device by which the flat tire occurred. *Coronet Casuals, Inc.*, 207 NLRB 304 (1973). I therefore conclude that Respondent has failed to prove by a preponderance of the evidence that it had an honest belief that Frank engaged in the alleged misconduct. I therefore necessarily conclude that Respondent violated Section 8(a)(1) of the Act in suspending Harold Frank for 15 days because of the alleged conduct. *National Aluminum, Division of National Steel Corporation, supra.*

5. Ronald Archambault

By its suspension notice dated March 24, 1980 (G.C. Exh. 6), Respondent informed Archambault that he would be suspended for 15 working days at the conclusion of the strike because of misconduct on March 21, 1980, wherein he was alleged to have broken the "winter front" and screen of a company vehicle leaving the refinery. In addition, Archambault would be required to repay $69.51 as restitution for the property damage.

Respondent's supervisor, Henry "Dave" Haggard, a substitute driver at Respondent's refinery, testified that on March 21, 1980, as he was driving a truck leaving the refinery for the terminal, he stopped at the gate where the pickets were standing. He testified that, while two pickets stood in front of his truck for 15 minutes and would not let him proceed, he heard a "popping sound" and saw that one of the pickets wearing a blue hood was in front of the truck. This picket said something to another picket, ran to a car, and left. A Pinkerton guard yelled on the radio that the picket had pulled the bug screen and winter front loose from the front of the truck. Haggard then drove to the terminal where it was discovered that the winter front (a canvas covering device placed on the radiator "bug screen") had been pulled loose.

Archambault, employed by Respondent since 1969, testified that he did not break the bug screen or the winter front and denied seeing that it was broken. He admits that he was present, touched the truck, and admits further that he unsnapped two snaps on the canvas winter front which held it to the bug screen. A photograph admitted in evidence without the General Counsel's objection (Resp. Exh. 2) showed damage to the bug screen and winter front apparently consistent with the aggravated quality of the damage as alleged by Respondent rather than a mere unsnapping asserted in Archambault's testimony. The photograph and Haggard's testimony indicated that screws and snaps attached to the bug screen had been pulled out and the aluminum mounting and frame holding the bug screen and winter front had been bent. According to Respondent this represented $60.51 worth of damage.

The issue presented is not whether Archambault touched the front of the truck and indeed unsnapped the winter screen but rather whether Respondent had a good-faith belief that he did somewhat more. In view of the fact that the General Counsel did not object to Respondent's introduction in evidence of the picture showing extensive damage to the winter screen rather than mere unsnapping of the winter front from the bug screen, and in view of Respondent's witnesses' testimony that the photograph was taken immediately after Haggard arrived at the terminal after confronting Archambault on the picket line, Respondent has satisfactorily shown, on this record, that the damage to the winter front and the bug screen was in accordance with its version rather than Archambault's. There is no reason to believe on this record that Respondent was responsible for aggravation of the damage to Respondent's property between the time that Archambault admittedly touched it and the photograph. Thus there is no reason to disbelieve the evidence of the photograph, which I credit. I therefore conclude that Respondent had an honest belief that Archambault engaged in the misconduct alleged in its March 24 suspension notice; and that the conduct engaged in by Archambault was not a minor piece of implusive behavior, *N.L.R.B.* v. *Thor Power Tool Company*, 351 F.2d 584, 587 (7th Cir. 1965), but was part of an attempt to engage in harassing conduct. In this situation, Archambault, on the record before me, although engaged in concerted activities otherwise under the protection of the Act, *Groendyke Transport, Inc.* v. *N.L.R.B.*, 530 F.2d 137 (10th Cir. 1976), overstepped the mark and must suffer the consequences. The 15-day suspension and the demand for restitution do not smack of ulterior motives. I express no opinion here, similar to the case of Glowacki and the alleged damage to the truck tire, regarding the amount of damages which Respondent states it will seek to collect from Archambault because of the damage to the bug screen and winter front. I recommend

only that the Board find, as I do, that Respondent had an honest belief that Archambault caused the above damage, that the General Counsel failed to prove his innocence, and that the act was not so trivial as to merit condonation as an exhibition of animal spirits. I therefore recommend that the consolidated complaint be dismissed with regard to Archambault.

Case 18-CA-6665: Alleged Violation of Section 8(a)(1) and (3)

The Discontinuance of Sick Leave Payments to Patricia A. Fransen

The Fransen matter was tried essentially pursuant to stipulated facts.

Respondent admits that Patricia A. Fransen was its employee and that on or about the commencement of the strike, January 8, 1980, and continuing until on or about February 22, 1980, Respondent suspended and discontinued her sick leave payments which were being made pursuant to its Comprehensive Disability Income Plan. Respondent denied that it engaged in that conduct because Fransen was engaged in a strike and asserted that it did so without ascertaining whether she had actively participated in or joined in the strike.

It was stipulated that Fransen was an employee covered by the above collective-bargaining agreement's Comprehensive Disability Income Plan (CDIP); that the employees covered by the plan were production and maintenance employees; that as of January 1, 1980, Fransen was employed in the production and maintenance unit as a full-time employee; that she had been continually employed by Respondent since 1974; that an economic strike commenced on January 8, 1980, at 4:30 p.m. and ended at the close of April 1, 1980, with employees returning to work on April 2, 1980; that Fransen was not able to work for medical reasons commencing on January 3, 1980, but was authorized by her physician to return to work commencing on March 25, 1980; that Respondent paid her sick leave pay under the terms of CDIP from the period January 3-8, 1980; that commencing with the beginning of the strike on January 8, 1980, Fransen was confined to a hospital; that commencing January 8, 1980, the start of the strike, Respondent discontinued sick leave payments to Fransen and did not pay her additional sick leave payments commencing January 9 through February 22, 1980; that commencing February 22, 1980, the Charging Party, Fransen, actively participated in the strike by picketing for the Union; that Fransen, between January 8 and February 22, 1980, did not inform Respondent either that she supported the strike or that she did not support the strike; that when Respondent discontinued paying her sick leave payments on January 8, 1980, it knew that she was under a physician's care; that no employee represented by the Union ever worked during a union strike; that Fransen supported the strike by the production and maintenance employees in a union strike occurring in 1975; that no union representative made a protest to Respondent that Fransen was unable to work and was not a participant in the strike; and that, upon her return from the strike, Fransen was paid at the rate of pay specified in the strike settlement.

Article III of the 1979-81 collective-bargaining agreement (G.C. Exh. 2) in effect at the time of the January 8, 1980,[8] strike contains a union-security clause requiring maintenance of membership for existing employees who are union members and also union membership after 30 days of employment or 30 days after the effective date of the agreement, whichever was the later. Article 16(D) of the agreement provides, as one of the company benefits, for the Comprehensive Disability Income Plan. A description of the plan is found in Respondent's publication of a description of the plan (G.C. Exh. 4). Under paragraph therein entitled "Denial of Benefits," subsection 4 states:

> If benefits are being paid prior to a strike or layoff, such benefits will cease for the duration of such strike or layoff. No benefits will be paid during the time you are on strike or layoff.

Similarly, in a January 15, 1980, Respondent letter (G.C. Exh. 5) to its striking employees, Respondent reminded them, with regard to the plan, that: "Coverage under the Comprehensive Disability Income Plan is discontinued for employees on strike."

The Board, in *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB 1143 (1979) (Member Jenkins dissenting in part; Member Penello dissenting), dealing with the cessation of sick leave benefits to an employee who had been receiving them prior to the initiation of a strike, overruled *Southwestern Electric Power Company*, 216 NLRB 522 (1975), and, adopting the rationale suggested by Chairman Fanning (dissenting in *Southwestern Electric Power Co., supra*), held that employees have a Section 7 right to refrain from declaring their position on the strike to their employer while they are medically excused.[9] As a consequence of this conclusion that Board announced as its rule [*E. L. Wiegand Division, Emerson Electric Co., supra*, 246 NLRB 1143-44]:

> [A]n employer may no longer require its disabled employees to disavow strike action during their sick leave in order to receive disability benefits. . . .
>
> * * * * *
>
> Accordingly, we now hold that for an employer to be justified in terminating any disability benefits to employees who are unable to work at the start of a strike it must show that it has acquired information which indicates that the employee whose bene-

[8] The strike, during the term of the agreement containing a no-strike provision, followed disagreement on terms specified in a "re-opener" in art. 22.

[9] Respondent argues that the Board imprudently overruled *Southwestern Electric Power Co., supra*. That argument must be addressed to the Board rather than to me. Where Respondent argues that *Emerson Electric* invites employee fraud (employees on the eve of a strike will become "disabled" and receive unmerited benefits since Respondent cannot reasonably investigate the "illnesses" of such employees), it seems that any Sec. 7 right—or any other right—may be subject to fraudulent abuse.

> fits are to be terminated has affirmatively acted to show public support for the strike.

The Board's rationale for this rule is that: "To allow the termination of such benefits to certain employees as a result solely of the strike activities of others is to penalize the employees who have not yet acted in support of the strike." This rationale is analogized to the case of picket line misconduct. The Board, in this regard, in its footnote 3 [*E. L. Wiegand Division, supra*] states:

> Where sanctions are imposed by an employer for picket line misconduct, we have held that, before an employer may rely on an honest belief that a striking employee engaged in such misconduct, it must obtain proof that the specific employee engaged therein, and may not rely on the conduct of other strike participants. *Coronet Casuals, Inc.*, 207 NLRB 304, 305, (1973). We find that the necessity for a showing of such individual participation is likewise applicable where the conduct involved concerns the initial engagement in strike activity.

Although in the instant case, unlike *Emerson Electric Co., supra*, no union representative told Respondent that the Charging Party was unable to work and was not a participant in the strike, Respondent here stipulated that it paid her disability benefits commencing 5 days before the January strike; knew that she was confined to a hospital at the time the strike began; and discontinued the sick leave payments with the commencement of the strike notwithstanding the fact that Fransen did not inform Respondent that she supported the strike or indeed that she did not support the strike. The record, therefore, is barren of any showing that Respondent, as required by *Emerson Electric Co.*, "acquired information which indicates that the employees whose benefits are to be terminated, has affirmatively acted to show public support for the strike. Of course, commencing February 22, 1980, when the Charging Party began actively to participate in the strike by picketing for the Union, Respondent was in receipt of such evidence and, under *Emerson Electric*, could lawfully discontinue the benefits. It is clear, in short, that Respondent terminated the disability benefits (which were being paid to the Charging Party out of a disability arising before the commencement of the strike) without information showing that she affirmatively supported the strike.[10] As a *prima facie* matter, therefore, in view of the *Emerson Electric* rule, Respondent violated Section 8(a)(1) and (3) of the Act thereby.

Respondent defends on the ground that whatever the *prima facie* violation of Section 8(a)(1) and (3), Respondent and the Union, *by contract*, permitted Respondent to take the alleged unlawful action. Thus article 16, section 1(D), specifically makes the Comprehensive Disability Income Plan a company benefit to production and maintenance employees of which the Charging Party was one (G.C. Exh. 2, p. 35); and the plan itself (G.C. Exh. 4) specifically limits payment of disability benefits: "If benefits are being paid prior to a strike or layoff, such benefits will cease for the duration of such strike or layoff. No benefits will be paid during the time you are on strike or layoff."

For purposes of this Decision, it may be assumed, *arguendo*, that the above limitation in the General Counsel's Exhibit 4, subsection 4, on the payment of benefits was successfully incorporated by reference into the body of the collective-bargaining agreement (as conceded by Respondent, br., p. 7); that the Union agreed to the limitation proscribed in the above subsection; that such an agreement might constitute a contractual "waiver" by the Union against itself and all employees in the production and maintenance unit whom it represents from asserting rights under *Emerson Electric*; and that such waiver of sick pay benefits would be lawful because the intent of such a waiver would be to obviate the Employer's responsibility of perhaps inquiring into, or at least discovering, each employee's desires and intent with regard to the support of the strike as required by *Emerson Electric*, and, at the same time, would eliminate the responsibility for any such an inquiry stepping over the line into unlawful interrogation with regard to the employees' sentiments concerning support of the strike. Compare *Erie Resistor Corp.*, 132 NLRB 621 (1961), enforcement denied 303 F.2d 359 (3d Cir. 1962), revised and remanded 373 U.S. 221 (1963), and *N.L.R.B.* v. *Magnavox Company of Tennessee*, 415 U.S. 322 (1974). In short, however, even if Respondent attempted to thus secure a waiver of the rights of employees under *Emerson Electric Co., supra*, and even if such attempted waiver were lawful, the present language of the denial of benefits in case of a strike, at best, is so ambiguous as to prevent the inference that, by any such "waiver," Respondent excluded Fransen from the payment of disability benefits under the exclusion in subsection four. Indeed, even in its January 15, 1980, communication to its striking employees, Respondent noted the discontinuance of benefits under the plan "for employees on strike."

Thus, for instance while there would appear to be no difficulty in the meaning of the first sentence in the above subparagraph four describing cessation of benefits under the disability plan ("If benefits are being paid prior to the strike or layoff, such benefits will cease for the duration of such strike or layoff") because the subject matter of the sentence deals with the cessation of benefits, yet, the second sentence of subparagraph four ("No benefits will be paid during the time you are on strike or layoff") deals with the question of the class of persons who will be excluded from benefits. The second sentence, as does the above January 15 letter to striking employees, discloses that the agreed-upon restriction on the payments of benefits is, *inter alia, only to those employees who are on strike*. The hospitalized Fransen, in the period at issue, was not "on strike" and the contractual provision does not appear to relate to her.[11]

[10] I reject Respondent's contention (br., p. 6) that Fransen supported the 1980 strike because she supported the 1975 strike.

[11] A contract waiver of Fransen's *Emerson Electric* rights would have to be "clear and unmistakable," *Daniel Construction Co.*, 239 NLRB 1335, fn. 4 (1979). Any ambiguity in any such waiver must be construed against the promulgator, *N.L.R.B.* v. *Harold Miller, et al.*, 341 F.2d 870, 874 (2d Cir. 1965); *Farah Manufacturing Company*, 187 NLRB 601 (1970). Cf. *Gale Products, Div. of Outboard Marine Corp.*, 142 NLRB 1246 (1963).

It having been stipulated that the Charging Party did not join the picket line and therefore was not affirmatively acting to publicly support the strike until February 22, 1980, and that she otherwise met all conditions for the continued payment of disability benefits, and there appearing no other evidence, under *Emerson Electric Co., supra*, that Respondent "acquired information which indicates that the employee whose benefits are to be terminated has affirmatively acted to show public support for the strike" prior to February 22, 1980, it follows that Respondent failed to satisfy the requirements of *Emerson Electric* and therefore violated Section 8(a)(1) and (3) of the Act by discontinuing the disability benefits commenced on or about January 3 which discontinuance was for the period January 8 through February 22, 1980. Thus (A) under *Emerson Electric, supra*, the discontinuance of benefits violated Section 8(a)(1) and (3); and (B) the Union did not, by contract, waive Fransen's rights to benefits because it and her co-employees engaged in a strike.

It having been stipulated that the discontinuance of disability benefits commenced January 8, 1980, I shall recommend to the Board that Respondent pay to the Charging Party the disability benefits for the period January 9 through February 21, 1980 (the period until she appeared on the picket line), notwithstanding that her physician, according to the stipulation, certified that she was able to return to work no earlier than March 25, 1980. Cf. Member Jenkins dissenting in *Emerson Electric* on this point.

Upon the foregoing findings of fact, and upon the entire record herein considered as a whole, I make the following:

CONCLUSIONS OF LAW

1. Respondent, Conoco, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Oil, Chemical and Atomic Workers International Workers Union, AFL-CIO, Local 6-659, is a labor organization within the meaning of Section 2(5) of the Act.

3. By disciplining Tony Hackensmith, Douglas Utech, Joel Rabideaux, and Harold Frank, all of whom were Respondent's lawfully striking employees, without proof of their engaging in disqualifying strike misconduct, Respondent interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights and thereby violated Section 8(a)(1) of the Act.[12]

4. By withholding, from January 9 through February 21, 1980, inclusive, payment to its employee, Patricia A. Fransen, of disability benefits under its Comprehensive Disability Income Plan, because other of its employees engaged in a lawful strike, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

[12] It is unnecessary, as in *N.L.R.B.* v. *Burnup & Sims, supra*, 379 U.S. 21, 22-23, to reach or decide whether Respondent's conduct was also violative of Sec. 8(a)(3) of the Act. *Gold Kist, Inc.*, 245 NLRB 1095.

THE REMEDY

It having been found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully suspended Tony Hackensmith and Harold Frank for 15 days, and served unlawful warning notices on Douglas Utech and Joel Rabideaux, I shall recommend that Respondent make the suspended employees whole, without loss of seniority or other rights or privileges, for any loss of earnings each of them may have suffered by virtue of the unlawful suspension by paying to each of them, in addition to contributions to fringe benefit funds, an amount equal to that which each would have earned from the date of suspension to the date of reinstatement by Respondent. Such net backpay will be computed in the accordance with the Board's formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[13] In addition, I shall recommend to the Board that Respondent be required to expunge from its records all suspension and warning notices relating to the above employees against whom Respondent engaged in acts of unlawful interference, restraint, and coercion.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[14]

The Respondent, Conoco, Inc., Wrenshall, Minnesota, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Suspending, serving warning notices on, disciplining, or otherwise interfering with, restraining, or coercing striking employees who do not engage in disqualifying strike misconduct.

(b) Withholding payments of disability benefits from, or otherwise discriminating against, employees in the exercise of their rights to engage in or refrain from engaging in protected concerted or union activities, including the right to strike, thereby discouraging membership in Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local 6-659, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative actions deemed necessary to effectuate the policies of the Act:

(a) Make whole employees Tony Hackensmith and Harold Frank, by paying to each, as described in "The Remedy," the net backpay due them by virtue of their

[13] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

unlawful suspensions, with interest, pursuant to Board law, as well as reinstituting their seniority and other rights of which they were deprived by virtue of Respondent's unlawful acts against them.

(b) Make whole employee Patricia A. Fransen by paying to her, with interest, the disability benefits pursuant to the Comprehensive Disability Income Plan which was due to her during the period from and including January 9 through February 21, 1980.

(c) Expunge from all Respondent's records all suspension or warning notices, and any references thereto relating to the January-April 1980 strike activities of Tony Hackensmith, Harold Frank, Douglas Utech, and Joel Rabideaux.

(d) Preserve and make available to the Board or its agents, upon request, all records necessary to analyze the amount due for the effectuation of this remedial Order.

(e) Post at Respondent's refinery and place of business in Wrenshall, Minnesota, copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 18, after being duly signed by its representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 18, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that all other complaint allegations of Respondent's unfair labor practices be dismissed.

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[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."